

OPEN MEETING ITEM



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COMMISSIONERS
DOUG LITTLE - Chairman
BOB STUMP
BOB BURNS
TOM FORESE
ANDY TOBIN

ORIGINAL

ARIZONA CORPORATION COMMISSION

Executive Director

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AZ CORP COMMISSION
DOCKET CONTROL

DATE: JUNE 1, 2016
DOCKET NO.: WS-02987A-16-0017
TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Order on:

SWING FIRST GOLF, LLC v. JOHNSON UTILITIES, L.L.C. (COMPLAINT)

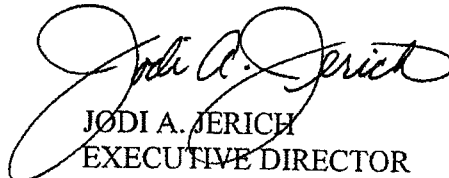
Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

JUNE 10, 2016

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

JUNE 14, 2016 AND JUNE 15, 2016

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.


JODI A. JERICH
EXECUTIVE DIRECTOR

Arizona Corporation Commission

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This document is available in alternative formats by contacting Shaylin Bernal, ADA Coordinator, voice phone number 602-542-3931, E-mail SABernal@azcc.gov.

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 DOUG LITTLE – Chairman
4 BOB STUMP
5 BOB BURNS
6 TOM FORESE
7 ANDY TOBIN

8 SWING FIRST GOLF LLC,

9 Complainant,

10 vs.

11 JOHNSON UTILITIES, L.L.C.,

12 Respondent.

DOCKET NO. WS-02987A-16-0017

DECISION NO. _____

ORDER

13 Open Meeting
14 June 14 and 15, 2016
15 Phoenix, Arizona

16 **BY THE COMMISSION:**

17 This Order comes before the Arizona Corporation Commission (“Commission”) to resolve
18 preliminary issues raised in a Motion to Dismiss the Formal Complaint (“Complaint”) filed by Swing
19 First Golf (“Swing First” or “SFG”) against Johnson Utilities, L.L.C. (“Johnson or the “Company”).
20 SFG’s Complaint alleges, among other things, that Johnson has unilaterally discontinued providing
21 effluent to SFG; Johnson failed to seek prior Commission approval before discontinuing its tariffed
22 effluent service to SFG; and Johnson’s actions are unlawful and against Commission policy. Johnson
23 asserts that the claims made by SFG in its Complaint are barred by the doctrine of *res judicata* and that
24 the Commission lacks subject matter jurisdiction to direct Johnson on how to use its effluent. We
disagree for the reasons set forth below.

25 * * * * *

26 Having considered the entire record herein and being fully advised in the premises, the
27 Commission finds, concludes, and orders that:
28

FINDINGS OF FACT**Procedural History**

1. On January 19, 2016, SFG filed with the Commission a Complaint against Johnson, alleging that Johnson has unilaterally decided to discontinue providing effluent to Swing First and other effluent customers. Swing First's Complaint alleges that if Johnson discontinues its effluent service, Johnson's actions would be unlawful and not in the public interest.

2. On February 2, 2016, Johnson filed an Answer to the Complaint disputing the allegations in the Complaint.

3. On February 22, 2016, Johnson filed a Motion to Dismiss SFG's Complaint.

4. On February 25, 2016, SFG filed a Supplement to Formal Complaint stating that Johnson had discontinued its tariffed effluent deliveries to Swing First effective February 24, 2016.

5. On March 21, 2016, by Procedural Order, a procedural conference was scheduled for April 6, 2016, and SFG was directed to file a response to Johnson's Motion to Dismiss by April 4, 2016.

6. On March 21, 2016, SFG filed a Response to Johnson's Motion to Dismiss.

7. On April 4, 2016, Johnson filed a Reply in Support of Motion to Dismiss.

8. On April 6, 2016, a procedural conference was held as scheduled. SFG, Johnson, and Staff appeared through counsel. Discussions were held regarding the status of effluent deliveries to SFG. At the conclusion of the procedural conference, Staff and SFG were directed to file briefs regarding preliminary issues of jurisdiction and Johnson was given additional time to file a responsive brief.

9. On April 29, 2016, SFG filed a Brief Opposing Motion to Dismiss.

10. On the same date, Staff filed a Response to Motion to Dismiss.

11. On May 9, 2016, Thomas K. Irvine filed a Notice of Appearance on behalf of Johnson.

12. On the same date, Johnson filed a Supplemental Reply in Support of Motion to Dismiss.

13. On May 10, 2016, Swing First filed a Supplemental Filing, stating that Johnson had threatened to discontinue all water service to Swing First on May 20, 2016, if Swing First failed to pay for groundwater delivered to the golf course between February 26 and April 25, 2016. Swing First's

1 filing stated that because Johnson had unilaterally discontinued deliveries of effluent to the golf course,
 2 and is only delivering groundwater, the golf course's cost for water had quintupled. Swing First
 3 requested that the Commission direct Johnson to: resume effluent deliveries; require Johnson to rebill
 4 unlawful groundwater deliveries at the effluent rate; and find that Johnson may only apply to
 5 discontinue a tariffed service as part of a rate case where the Commission can evaluate the requested
 6 rate's impacts, customer effects, and community consequences, as part of its determination of whether
 7 the application is in the public interest.

8 14. On May 17, 2016, by Procedural Order, SFG's request was granted and Johnson was
 9 prohibited, until further order of the Commission, from disconnecting the delivery of water to Swing
 10 First. Johnson was ordered to either resume the delivery of effluent (at the historical volume received
 11 by Swing First) or continue to deliver non-effluent water as required by Swing First.

12 Legal Authority

13 15. The Commission's authority to regulate public service corporations ("PSCs") is set forth
 14 in Article XV, Section 2 and 3 of the Arizona Constitution (hereinafter "Article XV"). Article XV,
 15 Section 3, states:

16 The Corporation Commission shall have full power to, and shall, prescribe
 17 just and reasonable classifications to be used and just and reasonable rates
 18 and charges to be made and collected, by public service corporations within
 19 the State for service rendered therein, and make reasonable rules,
 20 regulations, and orders, by which such corporations shall be governed in the
 21 transaction of business within the State, and may prescribe the forms of
 22 contracts and the systems of keeping accounts to be used by such
 23 corporations in transacting such business, and make and enforce reasonable
 24 rules, regulations, and orders for the convenience, comfort, and safety, and
 25 the preservation of the health, of the employees and patrons of such
 26 corporations; Provided, that incorporated cities and towns may be
 27 authorized by law to exercise supervision over public service corporations
 28 doing business therein, including the regulation of rates and charges to be
 made and collected by such corporations; Provided further, that
 classifications, rates, charges, rules, regulations, orders, and forms or
 systems prescribed or make (sic) by said Corporation Commission may
 from time to time be amended or repealed by such Commission. (emphasis
 added)

27 ...

28 ...

1 16. Article XV, Section 2, defines a PSC as:

2 All corporations other than municipal engaged in furnishing gas, oil, or
3 electricity for light, fuel, or power; or in furnishing water for irrigation, fire
4 protection, or other public purposes; or in furnishing for profit, hot or cold
5 air or steam for heating or cooling purposes; or engaged in the collecting,
6 transporting, treating, purifying and disposing of sewage through a system,
7 for profit; or in transmitting messages or furnishing public telegraph or
8 telephone service, and all corporations other than municipal, operating as
9 common carriers, shall be deemed public service corporations.

10 17. Pursuant to Arizona Revised Statutes ("A.R.S.") §40-246(A), the Commission may hear
11 complaints alleging violations by PSCs of law or rule or order of the Commission. A.R.S. §40-246
12 states in relevant part:

13 Complaint may be made by the commission of its own motion, or by any
14 person or association of persons by petition or complaint in writing, setting
15 forth any act or thing done or omitted to be done by any public service
16 corporation in violation, or claimed to be in violation, of any provision of
17 law or any order or rule of the commission. . . .

18 18. Further, under A.R.S. §40-321(A), the Commission has authority to regulate the
19 adequacy of service provided by PSCs. A.R.S. §40-321(A) states:

20 When the commission finds that the equipment, appliances, facilities or
21 service of any public service corporation, or the methods of manufacture,
22 distribution, transmission, storage or supply employed by it, are unjust,
23 unreasonable, unsafe, improper, inadequate or insufficient, the commission
24 shall determine what is just, reasonable, safe, proper, adequate or sufficient,
25 and shall enforce its determination by order or regulation.

26 19. The Commission has established rules setting forth the requirements a PSC must follow
27 before discontinuing or abandoning a utility service. Arizona Administrative Code ("A.A.C.") R14-2-
28 402(C) states that a utility is required to file an application to discontinue or abandon service, as
29 follows:

- 30 1. A utility shall not discontinue or abandon any service currently in
31 use by the public without first obtaining authority therefor from the
32 Commission.
- 33 2. A utility desiring to discontinue or abandon a service shall file with
34 the Commission an application identifying the utility; including data
35 regarding past, present and estimated future customer use of the
36 service; describing any plant or facility would no longer be in use if
37 the application were approved; and explaining why the utility

desires to discontinue or abandon the service.

3. A utility is not required to apply for Commission approval to remove individual facilities where a customer has requested service discontinuance.

Johnson's Position

20. There is no dispute that Johnson is a PSC within the meaning of Article XV, Sections 2 and 3, of the Arizona Constitution.¹

21. Johnson asserts that the Commission lacks jurisdiction to direct how Johnson uses the effluent it generates through its wastewater service within its Certificate of Convenience and Necessity ("CC&N") area. Specifically, as of February 24, 2016, Johnson discontinued delivery of effluent to SFG.² Johnson stated that it plans to begin recharging all effluent it formerly delivered to SFG to reduce its Central Arizona Groundwater Replenishment District ("CAGR") tax obligation.³ In other words, Johnson asserts that for every gallon of groundwater Johnson pumps and then recharges it will reduce its CAGR tax assessment.⁴ Johnson stated that it believes its plan will improve the

¹ Johnson's Supplemental Reply in Support of Motion to Dismiss at 1.

² SFG's Supplement to Formal Complaint, Exhibit A.

³ In Commission Decision No. 71854 (August 25, 2010), at pages 35-37, the Commission described the history and purpose of the CAGR as follows:

The CAGR was established in 1993 by the Arizona legislature to serve as a groundwater replenishment entity for its members. The CAGR is operated by the Central Arizona Water Conservation District, which operates the Central Arizona Project. The CAGR provides a mechanism for landowners and designated water supply providers to demonstrate a 100-year water supply under Arizona's assured water supply rules ("AWS rules") which became effective in 1995. Members of the CAGR must pay the CAGR to replenish (or recharge) any groundwater pumped by the member that exceeds the pumping limits imposed by the AWS rules. The CAGR includes the Phoenix, Tucson, and Pinal active management areas ("AMAs"). Joining the CAGR is one of the steps in the process of becoming a designated provider, which means that a water provider has demonstrated to the Arizona Department of Water Resources ("ADWR") that it has a 100-year water supply. The AWS rules were designed to protect groundwater supplies within each AMA and to ensure that people purchasing or leasing subdivided land within an AMA have a water supply of adequate quality and quantity. The AWS Rules require new subdivisions to demonstrate to ADWR that a 100-year water supply is available to serve the subdivision before home sales can begin. An assured water supply can be demonstrated in one of two ways: the subdivision owner can prove an assured water supply for the specific subdivision and receive a certificate of assured water supply ("CAWS") from ADWR; or alternatively, a subdivision owner can receive service from a city, town, or private water company that has been designated by ADWR as having a designated water supply.

The costs of the CAGR are covered by a replenishment assessment levied on CAGR members. Designated water supply providers such as Johnson that serve a Member Service Area pay a replenishment tax directly to the CAGR according to the number of acre-feet of "excess groundwater" they deliver within their service areas during a year. The amount due the CAGR is based on CAGR's total cost per acre-foot of recharging groundwater, including the capital costs of constructing recharge facilities, water acquisition costs, operation and maintenance costs and administrative costs. . . . (internal footnotes omitted)

⁴ SFG's Supplement to Formal Complaint, Exhibit A.

1 groundwater portfolio in Arizona and that the cost of replenishing groundwater will be passed through
2 to Johnson's customers in the form of reduced CAGR fees on their monthly bills.⁵

3 22. Johnson contends that the effluent it generates through its wastewater service is not
4 "water" as defined by Article XV, Section 2. Johnson asserts that although it is a PSC, the effluent it
5 delivers to customers does not fall within the scope of "collecting, transporting, treating, purifying and
6 disposing of sewage through a system, for profit," as described within Article XV, Section 2.⁶ Johnson
7 asserts that effluent is "a byproduct of the sewage treatment service provided by a PSC and that the
8 Commission may not direct how that PSC must use its effluent."⁷ Further, Johnson argues that because
9 effluent is not mentioned in Title 40 of the Arizona Revised Statutes, and there are no Commission
10 rules regarding the sale of effluent, the lack of a statute or rule bars the Commission from asserting
11 jurisdiction.⁸

12 23. Johnson states that the Arizona Supreme Court has held that effluent is neither surface
13 water nor groundwater, but that effluent is effluent. Johnson relies on an Arizona Supreme Court case,
14 *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), in support of
15 its position that effluent is not "water" as described in the Article XV. In *Long*, a group of property
16 owners brought suit against various Arizona cities and a group of public utilities, challenging the cities'
17 use of contracts to sell effluent to the public utilities who in turn supplied the effluent used during
18 construction of the Palo Verde Nuclear Generating Station.

19 24. In *Long*, the property owners, who were located downstream of where the cities
20 appropriated water, alleged that the cities' contracts deprived the property owners of appropriative
21 water rights because the cities were no long discharging excess effluent into the river bed.

22 25. Johnson argues that the following language, as articulated in *Long*, is probative as to the
23 nature of effluent. The court stated:

24 In summary, we hold that the effluent in question is neither groundwater
25 nor surface water. Whether diverted by appropriation or withdrawn from
26 the ground, after use by the municipalities the water loses its original

27 ⁵ SFG's Supplement to Formal Complaint, Exhibit A.

⁶ Johnson's Motion to Dismiss at 10.

⁷ *Id.* at 10.

28 ⁸ Johnson's Supplemental Reply in Support of Motion to Dismiss at 4.

character as groundwater or surface water and becomes, instead, just what the statute describes - effluent. See A.R.S. § 45-402(6). The Cities' expenditure of tens if not hundreds of millions of dollars for sewer lines, purification plants and equipment does not transform the water and change it back into groundwater or surface water. It remains effluent.

Neither the statutes dealing with groundwater nor those dealing with appropriation of surface water control or regulate the Cities' use or disposition of effluent. Thus, the Cities are free to contract for the disposition of that effluent and the utilities, having purchased the right to use the effluent, may continue to use it.⁹

... [W]hile effluent is neither groundwater nor surface water, it is certainly water. In this state, the constitution having abolished the riparian doctrine, see Ariz. Const. art. 17§ 1, neither stream nor groundwater is private property free from regulation. Those who lawfully appropriate or withdraw water have only the right to use it in accordance with the law. . . .

26. According to Johnson, case law from the Arizona Court of Appeals further supports Johnson's position that the Commission lacks subject matter jurisdiction over Johnson's effluent service. Johnson cites *Arizona Water Company v. City of Bisbee*, 172 Ariz. 176, 836 P.2d 389 (Ct. App. 1991), whereby Arizona Water Company ("Arizona Water") brought suit against the City of Bisbee ("Bisbee") alleging that Bisbee was unlawfully selling "water" within Arizona Water's CC&N service area when Bisbee began delivering effluent from its wastewater treatment plant to Phelps Dodge for its leaching operation. Arizona Water alleged that the Bisbee's delivery of effluent within Arizona Water's CC&N, to Phelps Dodge, constituted a competing service in violation of A.R.S. §§ 9-515 and 9-516 and that Bisbee had taken Arizona Water's property without compensation.

27. The court in *Bisbee* stated that the effluent being delivered to Phelps Dodge contained pathogenic bacteria, fecal coliform bacteria, and metals such as arsenic and cadmium and that the effluent was not fit for either irrigation purposes or for human consumption.¹⁰ The court in *Bisbee* stated that Arizona Water did not provide wastewater service and therefore could not generate effluent within its CC&N area. The court concluded that "[b]ecause effluent is not the same as the water that Arizona Water provides to its service area, we find no merit to Arizona Water's contention that the city is illegally competing with it."¹¹

⁹ Johnson citing *Long*, 160 Ariz. 429, 438, 773 P.2d 988, 997.

¹⁰ *Arizona Water Co. v. City of Bisbee*, 172 Ariz. 177 (1991).

¹¹ *Id.* at 179.

1 28. Johnson asserts that because “Bisbee was not stopped from providing effluent in
2 Arizona Water’s CC&N, nor was it required to acquire the utility’s system, the effluent was not a
3 ‘public utility service under the authority of law’ subject to the Commission’s jurisdiction.”¹²

4 29. Johnson contends that these cases show effluent is not water; therefore, the delivery of
5 effluent is not “furnishing water for irrigation, fire protection, or other public purposes” which would
6 subject Johnson or any deliverer of effluent to regulation as a water PSC.¹³ Johnson also argues that
7 the delivery of effluent is not “collecting transporting, treating, purifying and disposing of sewage
8 through a system for profit,” which would subject Johnson or any deliverer of effluent to regulation as
9 a sewer PSC. Johnson asserts that because the *Long* court ruled that effluent is effluent, and the owner
10 is free to choose how it will use that effluent, the Commission is without jurisdiction to direct how
11 Johnson uses its effluent.

12 30. Johnson also contends that a recent Commission case supports Johnson’s position that
13 the sale and disposition of effluent is an exercise of management discretion and does not require prior
14 Commission approval. In Decision No. 74993 (March 16, 2015), the Commission granted approval
15 for Liberty Utilities (Litchfield Park Water & Sewer) Corp. (“Liberty”) to sell all or any excess effluent
16 to the Central Arizona Water Conservation District (“CAWCD”) at a rate not to exceed Liberty’s
17 Commission-authorized rate, unless approved to do so by the Commission.¹⁴

18 31. Johnson points to language in Liberty’s application to support its position that the sale
19 and disposition of its effluent is outside of the Commission’s jurisdiction. Liberty’s application stated
20 that Liberty believed “Commission approval of the Development Agreement (“Agreement”) or sale of
21 effluent to the CAWCD was not necessary or required under Arizona law.” However, Liberty sought
22 Commission approval of the special contract terms to be executed in the Agreement with the CAWCD,
23 which Liberty believed were in the best interest of Liberty’s customers, the public and the CAP and/or
24 the CAWCD. Liberty stated that the transaction with the CAWCD would benefit Liberty’s customers
25 and the general public by:
26

27 ¹² Johnson’s Reply in Support of Motion to Dismiss at 5.

28 ¹³ Johnson’s Motion to Dismiss at 12.

¹⁴ Decision No. 74993 at 15.

- a. Recharging effluent within one mile of declining groundwater elevations near Luke Air Force Base and help address declines in groundwater elevations in the area;
- b. Increasing the CAWCD's ability to recharge the aquifer in an already-developed portion of the western Phoenix Active Management Area;
- c. Reducing the need for CAP water in recharge operations and supporting the use of long term renewable supply of water through the use of excess effluent;
- d. Resolving Liberty's need for a long term method for disposal of excess effluent at a cost to customers; and
- e. Providing a model for public-private partnerships that increase CAP availability and recharges aquifers with excess effluent.¹⁵

32. In Decision No. 74993, Liberty asserted that the transaction would specifically benefit its customers by recharging the aquifer and replenishing groundwater in its CC&N area and within the service area where groundwater is pumped; reducing customers' property tax payments for CAWCD assessments; and creating a stable revenue stream from yearly payment by the CAWCD for effluent which would allow Liberty to better serve its customers.¹⁶

33. As part of Staff's review of Liberty's application, Staff's analysis included a high level assessment of the public benefits associated with the transaction and the impact to Liberty's ratepayers.¹⁷ Staff agreed with Liberty's assertions related to the proposed benefits to customers.¹⁸ In addition, Staff considered the value of investment alternatives, and resulting revenues and expenses associated with the transaction between Liberty and the CAWCD, and other effluent disposal solutions that might need to be considered if a joint alternative was not available.¹⁹

34. In the Liberty docket, Staff stated that it supported the overall concept of Liberty and CAWCD's long-term and unique Agreement. Staff stated that given the circumstances of the case, it agreed with Liberty that entering into the underlying Agreement with the CAWCD and selling effluent to CAWCD are matters of management discretion, and that specific Commission approval of any isolated elements of the Agreement, or the Agreement as a whole, was not required. However, Staff recommended that the Commission express its general support of the Agreement due to the public

¹⁵ Decision No. 74993 at 7-8.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 9

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

1 benefits to be derived from the Agreement.²⁰ The Commission concluded that the “terms of the
2 Development Agreement, as currently stated, do not require Commission approval.”²¹ However, the
3 Commission also stated that it has jurisdiction over Liberty Utilities and of the subject matter of its
4 application.²²

5 35. Based on the above language, Johnson contends that the Commission has no authority
6 under the Arizona Constitution to direct how Johnson uses its effluent, and that SFG’s arguments that
7 Johnson cannot sell effluent without Commission authorization, or stop selling effluent altogether, is
8 at odds with Commission Decision No. 74933.²³

9 36. Johnson argues that although Decision No. 74036 (August 16, 2013) required Johnson
10 to make an effluent tariff filing setting forth the provision of its effluent service, including the terms
11 and conditions of service, Johnson only has a rate for effluent contained in its wastewater tariff and
12 that Johnson does not have an actual “effluent tariff.” Johnson states that in Decision No. 74036 the
13 Commission ordered Johnson to make an effluent tariff filing and after Staff’s review, the Commission
14 was to approve the tariff. Johnson argues that because the Commission has not approved its effluent
15 tariff, and the Commission is without jurisdiction to direct Johnson on how to use its effluent, Johnson
16 will seek to withdraw its effluent tariff.²⁴ Further, Johnson argues that because the sale of effluent does
17 not fall within the meaning of regulation of a PSC, there is no reason or requirement to seek prior
18 Commission approval under A.A.C. R14-2-402(C) in order to recharge the effluent it owns instead of
19 selling that effluent to SFG or any other purchaser.²⁵

20 37. Johnson contends that even if the Commission has jurisdiction, SFG’s claims, as stated
21 in the Complaint, are barred by the doctrine of *res judicata* and therefore the Commission must dismiss
22 the Complaint under Arizona Supreme Court Rule 12(b)(6) for lack of subject matter jurisdiction.
23 According to Johnson, Arizona courts have stated claims previously made may be barred by the
24 doctrine of *res judicata*, which precludes a claim when a former judgment on its merits was rendered
25

26 ²⁰ Decision No. 74993 at 12.

27 ²¹ *Id.* at 15.

28 ²² *Id.*

²³ Johnson’s Reply in Support of Motion to Dismiss at 7.

²⁴ Johnson’s Motion to Dismiss at 12 and Johnson’s Supplemental Reply in Support of Motion to Dismiss at 4-5.

²⁵ Johnson’s Reply in Support of Motion to Dismiss at 8.

1 by a court of competent jurisdiction and the matter now at issue between the same parties or their
2 privities was, or might have been, determined in a former action.²⁶

3 38. Johnson argues that the claims raised in this Complaint were previously raised in two
4 prior complaint cases filed by SFG against Johnson. In 2008, SFG filed a Formal Complaint ("2008
5 Complaint") against Johnson alleging that: SFG should be receiving as much effluent as Johnson can
6 deliver, in accordance with SFG's requirements; SFG has a right to the first effluent generated in
7 Johnson's CC&N area, but that Johnson rarely delivered effluent; Johnson had withheld effluent from
8 SFG; and Johnson had been selling effluent to other irrigation customers, and pumping most of the
9 effluent it produces into the ground.²⁷ The 2008 Complaint also alleged, among other things, that
10 Johnson had been incorrectly billing SFG for an eight-inch meter rather than a three-inch meter.²⁸ SFG
11 later requested that the 2008 Complaint be dismissed with prejudice. The Commission granted SFG's
12 request in Decision No. 73137 (May 1, 2012).

13 39. Subsequently, in 2013, SFG filed a second Formal Complaint ("2013 Complaint")
14 against Johnson, again alleging that: Johnson should be required to deliver effluent to SFG; SFG had
15 the right to first effluent generated by Johnson; Johnson should not be allowed to sell effluent to other
16 customers or pump it into the ground; Johnson had withheld effluent from SFG; and SFG should be
17 billed for a three-inch rather than an eight-inch meter.²⁹

18 40. In Decision No. 74036 (August 16, 2013), the Commission granted, in part, Johnson's
19 Motion to Dismiss the 2013 Complaint based on the doctrine of *res judicata*. Although Decision No.
20 74036 dismissed Counts A and B of SFG's 2013 Complaint, the Commission found that in regards to
21 Count A, which alleged that Johnson was essentially withholding effluent from SFG, delivering more
22 expensive CAP water to SFG, and that Johnson was pumping effluent into the ground rather than selling
23 it to SFG; the Commission concluded that it was appropriate to require Johnson to file an effluent tariff,
24 for Staff's review and for Commission approval, concerning its provision of effluent service, including
25 the terms and conditions of service.³⁰

26 ²⁶ *Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776 at 750 (1999).

27 ²⁷ Decision No. 74036 at 8.

28 ²⁸ *Id.* at 9.

29 ²⁹ *Id.* at 9-10.

30 ³⁰ *Id.* at 22.

1 41. Johnson alleges that SFG's Complaint in this docket is also barred by the doctrine of
2 *res judicata* because SFG is asserting the same claims.

3 42. Johnson also alleges that even if SFG's claims in this Complaint are not barred by *res*
4 *judicata*, they must be dismissed pursuant to Rule 12(b) (1) of the Arizona Rules of Civil Procedure
5 for lack of subject matter jurisdiction.

6 **SFG's Position**

7 43. SFG disputes Johnson's claim that the Commission lacks jurisdiction to direct Johnson
8 on how it must use its effluent. SFG asserts that as a PSC, the Commission's jurisdiction is
9 comprehensive over Johnson's activities.³¹

10 44. SFG states that the Commission's authority to regulate Johnson is derived from Article
11 XV. SFG asserts that because Johnson is providing Class A+ effluent, ultra-pure water, to SFG and
12 other customers for irrigation, Johnson is a private, for-profit corporation, "furnishing water for
13 irrigation," as defined in Article XV, Section 2.³² Further, SFG contends that because Johnson treats
14 and purifies sewage to Class A+ standards, and then disposes of it through its system by delivering
15 effluent to SFG and other customers, it is "engaging in collecting, transporting, treating, purifying and
16 disposing of sewage through a system," as described in Article XV, Section 2.³³

17 45. SFG disputes Johnson's reliance on the *Long* case to support its position that the
18 Commission lacks jurisdiction in this matter. SFG states that the *Long* case can be distinguished from
19 the facts in this docket because the Commission's jurisdiction was never raised or addressed in *Long*
20 due to the fact that the effluent sales in that matter were being conducted by a municipality and not a
21 PSC.³⁴

22 46. Likewise, in the *Bisbee* case, SFG contends that the facts in that case are distinguishable
23 from the facts in this docket. In this docket, SFG states that Johnson is delivering the highest grade
24 (Class A+) reclaimed water that can be used for irrigation purposes. By contrast, in *Bisbee*, SFG states
25 that:

26 _____
27 ³¹ SFG's Brief Opposing Motion to Dismiss at 5-6.

28 ³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.*

- a. The City of Bisbee was not subject to Commission regulation;
- b. Arizona Water did not have a sewer CC&N and could not generate or deliver effluent;
- c. Any for-profit corporation that held a sewer CC&N could have sold effluent to Phelps Dodge without violating Arizona Water's CC&N; and
- d. The effluent being delivered to Phelps Dodge was unfit for irrigation.

47. SFG states that the *Bisbee* case supports public policy in Arizona to conserve groundwater, while Johnson's proposal to pump and deliver only groundwater to SFG is contrary to that public policy.³⁵ SFG states that, in *Bisbee*, Arizona Water wanted to deliver groundwater to Phelps Dodge, but the Court correctly allowed the delivery of poor quality effluent in support of Arizona's public policy to conserve groundwater.³⁶

48. SFG also disputes Johnson's contention that the *Liberty* case supports Johnson's position that the Commission lacks jurisdiction over Johnson's effluent use. SFG points to the fact that Liberty sought a determination from the Commission that its Agreement with CAWCD was in the public interest prior to entering into the transaction. By contrast, SFG contends that Johnson unilaterally discontinued its tariffed effluent service to SFG; Liberty sought to sell excess effluent that was not committed to other customers; the Commission found that ratepayers would benefit from Liberty's transaction; and that the Commission stated it had jurisdiction over the subject matter of Liberty's application.³⁷

49. SFG further disputes Johnson's assertion that the issues raised in the above-captioned Complaint are barred by the doctrine of *res judicata*. SFG states that the relevant inquiry related to *res judicata* is "whether [the new claim] could have been brought" in the prior action.³⁸

50. SFG states that its current Complaint presents different facts and theories. SFG asserts that in this Complaint Johnson has notified SFG that it is permanently discontinuing all effluent deliveries to SFG; Johnson intends to only provide groundwater to SFG; and SFG has requested that the Commission determine whether Johnson can discontinue a tariffed service without prior

³⁵ SFG's Brief Opposing Motion to Dismiss at 8.

³⁶ *Id.*

³⁷ *Id.* at 9.

³⁸ SFG citing *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998).

1 Commission approval.

2 51. SFG alleges that the facts in the current Complaint could not have been previously
3 brought because Johnson never stated it would discontinue its tariffed effluent service to SFG.³⁹
4 Further, SFG contends that its current claim does not depend on the same essential facts asserted in the
5 previous complaints for their proof.⁴⁰ SFG states the facts in the current Complaint are:

- 6 a. Johnson has informed (and later discontinued) effluent deliveries to
- 7 SFG;
- 8 b. Johnson has not applied to the Commission for authorization to
- 9 discontinue tariffed effluent service;
- 10 c. Johnson intends to provide only groundwater to SFG, at a cost of
- 11 five times the effluent rate;
- 12 d. SFG will be forced out of business if Johnson discontinues effluent
- 13 service;
- 14 e. Closing the SFG golf course will have catastrophic effects on the
- 15 surrounding Johnson Ranch community; and
- 16 f. Johnson's discontinuance of effluent service is counter to
- 17 Commission policy to use effluent for golf course irrigation.

18 52. SFG states that its claims are also not barred by collateral estoppel because the issues in
19 this Complaint have never been litigated, nor were they raised in the 2008 Complaint or the 2013
20 Complaint.

21 53. SFG alleges that Johnson's discontinuance of effluent to SFG while continuing
22 delivery of effluent to Johnson's affiliate is discriminatory, illegal, and in violation of A.R.S. §40-243.
23 SFG alleges that Johnson is owned by George H. Johnson Revocable Trust, Jana S. Johnson, and
24 George H. Johnson. According to SFG, the Club at Oasis L.L.C. ("Oasis") is owned by George
25 Johnson's son, Chris Johnson, and another Johnson affiliate, Hunt Management LLC. Johnson has
26 stated, through its counsel, that it provides effluent to the Oasis golf course.⁴¹ SFG asserts that Johnson
27 "clearly intends to benefit Oasis, its commonly controlled affiliate, by destroying a competitor's golf
28 course."⁴²

54. SFG argues that it has a contractual right to receive effluent from Johnson and that the
Commission approved tariff is an enforceable contract between the parties. SFG relies on *Johnson v.*

³⁹ SFG Response to Motion to Dismiss at 2.

⁴⁰ *Id.*

⁴¹ Procedural Conference held on April 6, 2016, Tr. at 7.

⁴² SFG's Brief Opposing Motion to Dismiss at 10.

1 *Swing First Golf*, a Memorandum Decision issued by the Arizona Court of Appeals, in which the court
 2 concluded that the tariffed rate for effluent constituted a contract between Johnson and SFG.⁴³ Further,
 3 the court found that “[b]ecause the water rates that Utility can charge its customers for CAP water and
 4 effluent are set by the ACC, the approved tariffs constitute an enforceable contract between Utility and
 5 its customer, SFG . . .”⁴⁴

6 55. SFG disputes Johnson’s claim that Johnson’s plan to recharge all effluent will benefit
 7 customers. SFG states that the CAGR D calculates Johnson’s CAGR D assessment tax based on
 8 Johnson’s reported groundwater usage.⁴⁵ SFG states that because effluent is reclaimed water, not
 9 groundwater, Johnson does not include the 400 acre feet of effluent delivered to SFG in its annual
 10 report, and therefore Johnson is not assessed any tax for effluent deliveries to SFG.⁴⁶

11 Staff’s Position

12 56. Staff disputes Johnson’s claim that the Commission lacks jurisdiction over Johnson’s
 13 effluent service. Staff also disputes Johnson’s claim that it is not furnishing water for irrigation because
 14 effluent is not water and that the sale of that effluent does not make the provider of effluent a PSC.

15 57. Staff argues that such a “narrow view of the Commission’s authority and of the
 16 definition of effluent is not consistent with the applicable authorities.”⁴⁷ Staff states that the
 17 Commission’s constitutional and statutory authority gives it jurisdiction over Johnson because Johnson
 18 is a PSC, holds a CC&N for both water and wastewater, and its effluent disposal and the sale thereof
 19 falls within the Commission’s purview.⁴⁸

20 58. Staff disputes Johnson’s assertion that the *Long* case stands for the proposition that the
 21 Commission does not have jurisdiction because effluent is effluent, and not “water,” under Article XV,
 22 Sections 2 and 3. Staff states that, in the *Long* case, the court found that: while effluent is neither
 23 surface water nor groundwater, it is certainly water; one may have a right to use effluent, but not own
 24 it; and because the legislature had not passed statutes regulating the use of effluent, the cities had the

25
 26 ⁴³ See, *Johnson Util. LLC v. Swing First Golf, LLC* No. 1 CA-CV 13-0625, 2015 WL 5084101 (Ariz. Ct. App. 2015).

27 ⁴⁴ *Id.*

28 ⁴⁵ SFG Brief Opposing Motion to Dismiss at 18.

⁴⁶ *Id.*

⁴⁷ Staff Response to Motion to Dismiss at 2.

⁴⁸ *Id.*

1 right to put their effluent to any use they saw fit, including selling it to the utilities.⁴⁹

2 59. Staff states that the facts in *Long* are distinguishable from the facts raised in this
3 Complaint because the facts in *Long* involved stream appropriation, which depended on classifications
4 of groundwater and surface water, and a city's right to dispose of effluent was in question and not a
5 PSC.⁵⁰ Staff also states that, contrary to Johnson's assertions, the *Long* court concluded that effluent
6 was neither groundwater nor surface water, but the court recognized that effluent is certainly water.⁵¹

7 60. Staff argues that the *Bisbee* case is also distinguishable from the facts in this Complaint.
8 Staff argues that *Bisbee*, like *Long*, involved a municipality; the Commission has no jurisdiction over
9 municipalities; and the Commission's jurisdiction under Article XV, Section 2, does not depend on
10 effluent being classified as groundwater or surface water, but instead depends on the PSC's operations
11 falling within the text of Section 2.⁵² Staff contends that the disposal of effluent, and its sale for
12 irrigation purposes, is specifically included in Article XV, Section 2, and the activities alleged in the
13 Complaint are "clothed in the public interest," which is one of the factors used in determining whether
14 an entity is acting as a PSC.⁵³

15 61. Staff expressed concern regarding Johnson's plan to cease delivery of all effluent from
16 its San Tan wastewater treatment facility and instead recharge the effluent. Staff stated that in order to
17 replace the effluent that Johnson sells to SFG and its other effluent customers, Johnson must pump
18 equal amounts of groundwater. Staff states that Johnson's proposed plan could have a significant
19 impact on its water and wastewater operations because: 1) by pumping more groundwater Johnson may
20 increase its CAGRD fees without some corresponding reduction due to recharge; and 2) increased
21 groundwater sales may impact Johnson's rates. Staff believes that it will be difficult for the
22 Commission to address these concerns without a hearing on the issues.⁵⁴

23 62. Like SFG, Staff states that the Arizona Court of Appeals recently addressed the issue of
24 whether a rate for effluent confers Commission jurisdiction over effluent service. Staff points to
25

26 ⁴⁹ Staff Response to Motion to Dismiss at 3.

27 ⁵⁰ *Id.*

28 ⁵¹ *Id.*

⁵² *Id.* at 4.

⁵³ *Id.*

⁵⁴ *Id.* at 5.

1 *Johnson v. Swing First Golf*, to support its conclusion that Johnson's tariffed rate for effluent creates a
2 contractual obligation between Johnson and SFG.⁵⁵

3 63. Staff disputes Johnson's claim that the issues raised in the Complaint filed in this docket
4 are barred by the doctrine of *res judicata*. Staff asserts that the fact that Johnson intends to discontinue
5 all delivery of effluent from its San Tan wastewater treatment facility to SFG and its other effluent
6 customer to reduce its CAWCD fees, and will only deliver groundwater, distinguishes the facts of this
7 Complaint from the 2008 Complaint and the 2013 Complaint.

8 **Resolution**

9 64. Johnson's Motion to Dismiss asserts that the Commission lacks jurisdiction to direct
10 how Johnson uses the effluent it generates within its CC&N area. Johnson does not dispute that it is a
11 PSC and therefore subject to the Commission's regulations for its activities as such. However, Johnson
12 states that because the Commission's authority under Article XV, Section 2, of the Arizona
13 Constitution, Arizona Revised Statutes, and Commission rules do not include the sale of effluent, the
14 Commission is barred from asserting jurisdiction.

15 65. The Commission has broad discretion to regulate the activities of PSCs under the Article
16 XV. Pursuant to Article XV, Section 3, the Commission may "make and enforce reasonable rules,
17 regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of
18 the employees and patrons of such corporations." Further, Article XV, Section 2, describes the
19 activities that the Commission shall regulate regarding PSCs. Johnson states that its effluent service is
20 not "furnishing water for irrigation" and that the delivery of its effluent is not "collecting, transporting,
21 treating, purifying and disposing of sewage through a system, for profit," as described in Article XV,
22 Section 2. Although the word "effluent" is not used in Article XV, Section 2, the Arizona Supreme
23 Court expressly stated that "while effluent is neither ground water nor surface water, it is certainly
24 water". . . and "neither stream nor groundwater is private property free from regulation." The Court
25 also clearly stated that "[t]hose who lawfully appropriate or withdraw water have only the right to use
26 it in accordance with the law."

27
28 ⁵⁵ See, *Johnson Util. LLC v. Swing First Golf, LLC* No. 1 CA-CV 13-0625, 2015 WL 5084101 (Ariz. Ct. App. 2015).

1 66. Here, Johnson is a PSC and an authorized holder of a CC&N to provide water and
2 wastewater service in Arizona. Under Arizona law, even if Johnson did not hold a CC&N, the
3 Commission has authority to exercise jurisdiction over Johnson's activities if the Commission
4 establishes that Johnson is acting as a PSC.⁵⁶ Article XV, Section 2, and the language articulated in
5 the *Long* case, when read together make clear that Johnson's effluent service is "furnishing water for
6 irrigation" and that Johnson's delivery of effluent is "collecting, transporting, treating, purifying and
7 disposing of sewage through a system, for profit." Moreover, in accordance with Arizona law,
8 Johnson's right to use its effluent must be in accordance with the law.

9 67. Nor are we persuaded by Johnson's reliance on the *Bisbee* case to support its position
10 that the Commission lacks jurisdiction over Johnson's effluent service. As argued by SFG and Staff,
11 we believe the *Bisbee* case is distinguishable from the facts in this Complaint because: *Bisbee* involved
12 a municipality, which is not subject to the Commission's jurisdiction; Arizona Water provided only
13 potable water, and not wastewater service, within its CC&N; and the court correctly concluded that no
14 competition existed between Arizona Water's potable water service and Bisbee's effluent service
15 because the "water" each provided was different. Johnson also asserts that the effluent in *Bisbee* was
16 not a public utility service under the authority of law. While the effluent generated by Bisbee was not
17 subject to the Commission's jurisdiction because Bisbee is a municipality, the distinguishing factor in
18 this matter is that Johnson is a PSC, authorized by the Commission to provide public utility
19 wastewater/effluent service as part of its CC&N, and is therefore subject to the Commission's
20 jurisdiction.

21 68. We disagree with Johnson's assertion that Decision No. 74933, granting approval for
22 Liberty to sell all or any excess effluent it generated to the CAWCD at a rate not to exceed Liberty's
23 Commission-authorized rate, is demonstrative of the Commission's lack of jurisdiction to direct how
24 Johnson uses its effluent. Like Johnson, Liberty is a PSC authorized to provide water and wastewater
25 utility services as a part of its CC&N. Johnson relies on language in Liberty's application which stated
26 that Liberty believed "Commission approval of the Agreement or sale of the effluent to the CAWCD
27

28 ⁵⁶ See, *Natural Gas Serv. Co. v. Serv-Yu Coop.* 69 Ariz. 328, 213 P.2d 677 (1950).

1 was not necessary or required under Arizona law.”

2 69. As part of Staff’s administrative review of Liberty’s application, Staff assessed the
3 overall impact to ratepayers, investment alternatives, and resulting revenues and expenses associated
4 with the Liberty/CAWCD transaction, as well explored other effluent disposal solutions that might
5 need to be considered if the joint alternative was not available. Although the Commission found that
6 the terms of the Development Agreement do not require Commission approval, such a conclusion is
7 not the same as the Commission conceding jurisdiction over the subject matter of the application. In
8 fact, the Commission concluded that it did have subject matter jurisdiction in the Liberty case. As a
9 further exercise of the Commission’s jurisdiction over Liberty’s application, the Commission placed
10 conditions on its approval of Liberty’s application, requiring Liberty to file with the Commission: any
11 changes to the agreed-to effluent delivery fees; any changes to the agreed-to price for the sale of effluent
12 and effluent-driven long-term storage credits; and notice of any significant events occurring which
13 would materially impact Liberty’s performance under the Agreement including, but not limited to,
14 replacement or expansion of Liberty’s Palm Valley Wastewater Reclamation Facility. In addition, the
15 Commission required Liberty to submit, as a compliance item, and for Staff’s review and approval, a
16 proposed special contract tariff applicable to Liberty’s Agreement with CAWCD. Pursuant to Article
17 XV, Section 3, the Commission has authority to:

18 . . . [M]ake reasonable rules, regulations, and orders, by which such
19 corporations shall be governed in the transaction of business within the
20 State, and may prescribe the forms of contracts and the systems of keeping
21 accounts to be used by such corporations in transacting such business, and
22 make and enforce reasonable rules, regulations, and orders for the
convenience, comfort, and safety, and the preservation of the health, of the
employees and patrons of such corporations. . .”

23 70. We find that the Commission Decision No. 74933 is consistent with the Commission’s
24 authority pursuant to Article XV, Section 3, as well as our findings herein.

25 71. Having reviewed the issues raised in the current Complaint we also disagree that SFG’s
26 claims are barred by the doctrine of *res judicata*. Johnson’s notification that Johnson intends to
27 permanently discontinue all effluent to SFG (and has apparently already done so) and only deliver
28 groundwater to SFG are new facts not raised in the 2008 and 2013 Complaints. Further, the issue of

1 whether Johnson can discontinue its Commission-authorized tariff effluent service was not an issue in
2 the previous complaints. Therefore, we conclude that SFG's claims are not barred by *res judicata*.

3 72. SFG has also asserted that Johnson is discriminating against SFG in favor of other
4 customers. SFG's claims go beyond the preliminary issues raised in the Motion to Dismiss and will
5 not be addressed in this Decision regarding Johnson's Motion to Dismiss. Further, Johnson's claim that
6 its plan to recharge all effluent from its San Tan wastewater treatment plant will benefit customers goes
7 to the underlying issues raised in this Complaint and will be resolved after evidence and testimony is
8 presented on the issues.

9 73. Because Johnson's claim that it is not required, pursuant to A.A.C. R14-2-402(C), to
10 seek prior Commission approval before discontinuing its effluent service is beyond the threshold issues
11 raised in the Motion to Dismiss, the issue will be resolved after evidence and testimony is presented on
12 the issue.

13 74. Based on the above discussion, we find that the Commission has jurisdiction over
14 Johnson and the subject matter of the Complaint. We also find that the issues raised in the Complaint
15 are not barred by the doctrine of *res judicata*. Therefore, Johnson's Motion to Dismiss should be denied.

16 75. To resolve the underlying issues raised in the Complaint, it is appropriate to require
17 the Commission's Hearing Division to conduct further proceedings in this matter, including an
18 evidentiary hearing. It is also appropriate to reaffirm in this Decision that until the matters raised by
19 the Complaint have been resolved by the Commission, Johnson shall be prohibited from disconnecting
20 the delivery of water to SFG, and Johnson shall either resume the delivery of effluent (at the historical
21 volume received by SFG) or continue to deliver non-effluent water as required by SFG.

22 76. We also reaffirm that until further order of the Commission, SFG shall continue to pay
23 the tariffed effluent rate for all water delivered previously or delivered during the pendency of this
24 proceeding. Further, the temporary directives described herein shall not be construed as a
25 determination of the ultimate obligation of SFG to pay the full tariff rate for non-effluent water; rather,
26 it is an interim measure to maintain the status quo until the Commission has rendered a decision
27 regarding the underlying issues raised in the Complaint.

28 ...

CONCLUSIONS OF LAW

1
2 1. Johnson is a public service corporation pursuant to Article XV of the Arizona
3 Constitution and A.R.S. § 40-246.

4 2. Pursuant to Article XV of the Arizona Constitution, A.R.S. § 40-246, and A.A.C. R14-
5 2-406, the Commission has jurisdiction over Johnson and the subject matter of the Complaint filed in
6 this docket.

7 3. It is in the public interest to deny Johnson's Motion to Dismiss filed in this docket.

ORDER

8
9 IT IS THEREFORE ORDERED that Johnson Utilities, LLC's Motion to Dismiss is hereby
10 denied.

11 IT IS FURTHER ORDERED that the Hearing Division shall conduct further proceedings
12 related to the issues raised in the Complaint.

13 IT IS FURTHER ORDERED that until the matters raised by the Complaint have been resolved
14 by the Commission, Johnson Utilities, L.L.C. shall be prohibited from disconnecting the delivery of
15 water to Swing First, and Johnson Utilities, L.L.C. shall either resume the delivery of effluent (at the
16 historical volume received by Swing First) or continue to deliver non-effluent water as required by
17 Swing First. Until further order of the Commission, Swing First shall continue to pay the tariffed
18 effluent rate for all water delivered previously or delivered during the pendency of this proceeding.

19 IT IS FURTHER ORDERED that until further order of the Commission, Swing First should
20 continue to pay the rates set forth in the effluent rate tariff for all water delivered previously or delivered
21 during the pendency of this proceeding.

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

IT IS FURTHER ORDERED that the temporary directives described herein shall not be construed as a determination of the ultimate obligation of Swing First to pay the full tariff rate for non-effluent water; rather, it is an interim measure to maintain the status quo until the Commission has rendered a decision regarding the underlying issues raised in the Complaint.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN _____ COMMISSIONER _____

COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER _____

IN WITNESS WHEREOF, I, JODI JERICH, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _____ 2016.

JODI JERICH
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
YK:ru

1 SERVICE LIST FOR:

SWING FIRST FOLF, LLC v. JOHNSON UTILITIES,
L.L.C.

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SW-02987A-16-0017

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